

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

D.T. by and through his parents and
guardians, K.T. and W.T., individually,
on behalf of similarly situated
individuals, and on behalf of the
NECA/IBEW Family Medical Care
Plan

Plaintiff,

v.

NECA/IBEW FAMILY MEDICAL
CARE PLAN, THE BOARD OF
TRUSTEES OF THE NECA/IBEW
FAMILY MEDICAL CARE PLAN,
SALVATORE J. CHILIA, ROBERT
P. KLEIN, DARRELL L.
MCCUBBINS, GEARY HIGGINS,
LAWRENCE J. MOTER, JR., KEVIN
TIGHE, JERRY SIMS, AND ANY
OTHER INDIVIDUAL MEMBER OF
THE BOARD OF TRUSTEES OF
NECA/IBEW FAMILY MEDICAL
CARE PLAN,

Defendants.

CASE NO. C17-00004 RAJ

ORDER

1 This matter comes before the Court on Plaintiff’s Motion for Class Certification.
2 Dkt. # 34. Defendants NECA/IBEW Family Medical Care Plan (the “Plan” or “FMCP”),
3 the Board of Trustees of the FMCP, Salvatore J. Chilia, Robert P. Klein, Darrell L
4 McCubbins, Geary Higgins, Lawrence J. Moter, Jr., Kevin Tighe, and Jerry Sims’
5 (collectively “Defendants”) oppose the Motion, and Plaintiff has filed a Reply. Dkt. ##
6 45, 47. For the reasons that follow, the Court **GRANTS** Plaintiff’s Motion.

7 **I. BACKGROUND**

8 Plaintiff D.T., a three-year-old dependent on his parent’s NECA/IBEW Family
9 Medical Care Plan (“Plan”), was diagnosed with a developmental mental health
10 condition. Dkt. # 1 (Complaint) at ¶¶ 1, 9, 22-25; Dkt. # 17-1, Exs. B-D. Defendant
11 FMCP is a multiemployer health and welfare plan within the meaning of Section 3(2) of
12 the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1002(1),
13 that has been established pursuant to an agreement entered into between the International
14 Brotherhood of Electrical Workers (“IBEW”) and the National Electrical Contractors
15 Association (“NECA”) for the purpose of providing major medical benefits to covered
16 employees. Dkt. ## 11-1, 11-2.

17 Under the Plan, Defendants, who also comprise the Board of Trustees for the
18 Plan, cover mental health services to treat mental health conditions. *See* Dkt. # 11-3,
19 §§1.35. The Plan covers certain “mental health or nervous disorder” benefits. The
20 definition of “mental or nervous disorder” is broadly defined:

21 A neurosis, psychoneurosis, psychopathy, psychosis or mental
22 or emotional disease or disorder of any kind, regardless of
23 whether such condition, disease or disorder has causes or
24 origins which are organic, physiological, traumatic or
functional.

25 *Id.* (defining “mental or nervous disorder”). It is unclear whether autism spectrum
26 disorder (ASD) falls within the definition. Plaintiff claims that it does. Dkt. # 1 at ¶ 24;
27

1 *see also* Dkt. # 16 at 12 (Plaintiff reiterates that the definition “encompasses ASD and
2 other developmental conditions.”).

3 The Plan excludes coverage for benefits related to development delays.
4 Specifically, in a section titled, “Benefit Plan Conditions, Limitations and Exclusions,”
5 the Plan states that charges are not payable for the following:

6 Developmental delays, including charges for development and
7 neuro-educational testing or treatment, hearing therapy,
8 therapy for learning disability, communication delay,
9 perceptual disorders, sensory deficit, developmental disability
10 and related conditions, or for other special therapy not
11 specifically included as a Covered Medical Expense elsewhere
12 in this document, whether or not such disorder is the result of
13 an injury or sickness.

14 Dkt. # 11-3 at 48. D.T. sought coverage for either neurodevelopmental therapies
15 (“NDT”) or Applied Behavior Analysis (“ABA”) therapy but was denied under his Plan’s
16 Development Delay Exclusion. Dkt. # 17-1. Plaintiff alleges this exclusion is a “uniform
17 policy excluding all coverage for NDT and ABA therapies to treat developmental mental
18 health conditions like ASD, even when medically necessary.” Dkt. # 1 at ¶ 9. Plaintiff
19 claims that the Plan covers other benefits associated with developmental mental health
20 conditions, and therefore the uniform exclusion of coverage for NDT and ABA therapy is
21 a violation of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction
22 Equity Act of 2008 (“Parity Act”). Dkt. ## 1, 16. Defendants argue that the Plan
23 legitimately excludes coverage for any developmental mental health conditions, and
24 therefore there is no Parity Act violation for its refusal to cover NDT or ABA therapy
25 benefits. Dkt. # 11.

26 Plaintiff filed his Complaint on January 4, 2017. Dkt. # 1. Plaintiff asserted three
27 ERISA claims against Defendants: (1) recovery of benefits; (2) breach of fiduciary duty;
and (3) equitable relief. *Id.* at ¶¶ 26-39. On March 10, 2017, Defendants moved to
dismiss Plaintiff’s claims, which this Court denied. Dkt. ## 11, 20. On June 8, 2018,

1 Plaintiff filed the present Motion for Class Certification, which is now before the Court.
2 Dkt. # 34.

3 **II. LEGAL STANDARD**

4 The Court’s decision to certify a class is discretionary. *Vinole v. Countrywide*
5 *Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). Federal Rule of Civil Procedure 23
6 (“Rule 23”) guides the Court’s exercise of discretion. A plaintiff “bears the burden of
7 demonstrating that he has met each of the four requirements of Rule 23(a) and at least
8 one of the [three alternative] requirements of Rule 23(b).” *Lozano v. AT&T Wireless*
9 *Servs., Inc.*, 504 F.3d 718, 724 (9th Cir. 2007). Rule 23(a) requires a plaintiff to
10 demonstrate that the proposed class is sufficiently numerous, that it presents common
11 issues of fact or law, that it will be led by one or more class representatives with claims
12 typical of the class, and that the class representative will adequately represent the class.
13 *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); Fed. R. Civ. P. 23(a). If a
14 plaintiff satisfies the Rule 23(a) requirements, he must also show that the proposed class
15 action meets one of the three requirements of Rule 23(b). *Zinser v. Accufix Research*
16 *Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

17 In considering Rule 23’s requirements, the Court must engage in a “rigorous
18 analysis,” but a “rigorous analysis does not always result in a lengthy explanation or in
19 depth review of the record.” *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir.
20 2005) (citing *Falcon*, 457 U.S. at 161). The Court is neither permitted nor required to
21 conduct a “preliminary inquiry into the merits” of the plaintiff’s claims. *Blackie v.*
22 *Barrack*, 524 F.2d 891, 901 (9th Cir. 1975) (citing *Eisen v. Carlisle & Jacquelin*, 417
23 U.S. 156, 177 (1974)); *see also* Fed. R. Civ. P. 23 advisory committee’s note (2003)
24 (“[A]n evaluation of the probable outcome on the merits is not properly part of the
25 certification decision.”); *but see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351
26 (2011) (suggesting that Rule 23 analysis may be inextricable from some judgments on the
27 merits in a particular case). The Court may assume the truth of a plaintiff’s substantive

1 allegations, but may require more than bare allegations to determine whether a plaintiff
2 has satisfied the requirements of Rule 23. *See, e.g., Blackie*, 524 F.2d at 901, n.17; *Clark*
3 *v. Watchie*, 513 F.2d 994, 1000 (9th Cir. 1975) (“If the trial judge has made findings as to
4 the provisions of the Rule and their application to the case, his determination of class
5 status should be considered within his discretion.”).

6 **III. DISCUSSION**

7 Plaintiffs seek to certify the prospective class defined as follows:

8 All individuals who:

- 9 1) Have been, are or will be participants or beneficiaries under the
10 NECA-IBEW Family Medical Care Plan at any time on or after
11 January 4, 2011; and
- 12 2) Require neurodevelopmental therapy (speech, occupational or
13 physical therapy) or applied behavior analysis therapy to treat a
14 qualified mental health condition.

15 Definition: The term “qualified mental health condition” shall mean a
16 condition listed in the most recent edition of the Diagnostic and Statistical
17 Manual of Mental Disorders published by the American Psychiatric
18 Association to which defendants applied and/or currently apply the Plan’s
19 Developmental Delay Exclusion.

20 Dkt. # 1, ¶ 12. Defendants assert two main objections to Plaintiff’s proposed class
21 definition. The Court discusses each in turn.

22 *a. Ascertainability*

23 Defendants first contend that Plaintiff’s proposed class is “overly broad and not
24 ascertainable.” Dkt. # 45 at 4-6. “Rule 23 does not explicitly contain a requirement that
25 a class be ascertainable, however, many courts have found ascertainability to be a
26 prerequisite to class certification.” *See e.g., Torres v. Mercer Canyons, Inc.*, 305 F.R.D.
27 646, 651 (E.D. Wash. 2015); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 564 (C.D. Cal.
2014); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 440 (N.D. Cal. 2014); *Agne v.*
Papa John’s Int’l, Inc., 286 F.R.D. 559, 566 (W.D. Wash. 2012) (quoting *O’Connor v.*

1 *Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)). “A class is sufficiently
2 defined and ascertainable if it is ‘administratively feasible for the court to determine
3 whether a particular individual is a member.’” *In re ConAgra Foods, Inc.*, 302 F.R.D. at
4 565 (quoting *O’Connor*, 184 F.R.D. at 319). “Administrative feasibility means that
5 identifying class members is a manageable process that does not require much, if any,
6 individual factual inquiry.” *Lilly v. Jamba Juice Co.*, No. 13–CV–02998–JST, 2014 WL
7 4652283, at *3 (N.D. Cal. Sept.18, 2014) (quoting William B. Rubenstein, *Newberg on*
8 *Class Actions* (“Newberg”) § 3:3 (5th ed.)).

9 In other words, in order for a plaintiff to establish that a class is ascertainable, they
10 must show that: “(i) members of the proposed class are readily identifiable by objective
11 criteria, and (ii) it is administratively feasible to determine whether a particular person is
12 a member of the class.” *Kosta v. Del Monte Foods, Inc.*, 308 F.R.D. 217, 227 (N.D. Cal.
13 2015) (citing *Xavier v. Philip Morris USA Inc.*, 787 F.Supp.2d 1075, 1089 (N.D. Cal.
14 2011)); *see also Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). Nevertheless,
15 “the class need not be so ascertainable that every potential member can be identified at
16 the commencement of the action.” *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal.
17 2009) (quoting *O’Connor*, 184 F.R.D. at 319).

18 Defendants argues that Plaintiff’s proposed class is overbroad and not
19 ascertainable because it “does not consider whether proposed class members submitted a
20 claim, had claims denied in the past, or whether they are likely to have claims denied in
21 the future.” *Id.* at 5. Defendants also argue that because this definition does not stipulate
22 to “medical or a denial prohibited by [the Parity Act],” the class is not ascertainable
23 because each participant will need to be analyzed individually. *Id.* at 5-6.

24 The Court is unpersuaded by these arguments. The universe of proposed class
25 members is one limited to Plan participants, and only those that “require” NDT or ABA
26 to treat a “qualified mental health condition.” Dkt. # 34 at 4-5. The proposed class
27 members are thus readily identifiable through objective criteria. Moreover, the proposed

1 class members, under the Plan’s Developmental Delay Exclusion, would all be treated the
2 same: any claim for NDT or ABA treatment related to their qualifying condition would
3 be denied. *See Herra v. LCS Fin. Services Corp.*, 274 F.R.D. 666, 672–73 (N.D. Cal.
4 2011) (“What was ascertainable to [defendant] in the course of adhering to its own policy
5 is ascertainable for the purposes of identifying members of the class.”). Thus, in the
6 same way it is “administratively feasible” for Defendants to identify the types of
7 claimants and benefits the Developmental Delay Exclusion applies to, the Court believes
8 it “administratively feasible” to identify the proposed class members. Moreover, as
9 Plaintiff notes, participants are not necessarily required to submit claims and receive
10 denials to seek relief under ERISA provisions. *See, e.g., Wit v. United Behavioral*
11 *Health*, 14-CV-02346-JCS, 2017 WL 3478775, at *12 (N.D. Cal. Aug. 14, 2017) (finding
12 that “whether an ERISA claim is styled as a breach of fiduciary duty claim or a denial of
13 benefits claim,” plaintiffs need not demonstrate that “they were actually denied benefits”
14 to establish injury); *see also Shaver v. Operating Engineers Local 428 Pension Tr. Fund*,
15 332 F.3d 1198, 1203 (9th Cir. 2003) (finding that showing of loss not necessary for an
16 ERISA breach of fiduciary duty claim). Accordingly, not every putative class member
17 would need to submit a claim and face denial to be part of an ascertainable class in this
18 ERISA action.

19 The Court has little problem ascertaining the scope of Plaintiff’s proposed class.¹
20 Even if it did, however, “[a] lack of ascertainability alone will not defeat class

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23 ¹ As to Defendant’s brief argument that the proposed class is deficient because it includes
24 participants who may not have exhausted their administrative remedies, “a district court has
25 discretion to waive the exhaustion requirement . . . and should do so when exhaustion would be
26 futile.” *Horan v. Koch*, 947 F.2d 1412, 1416 (9th Cir. 1991) (overruled on other grounds). The
27 evidence shows that Defendants have consistently and routinely interpreted their policies to deny
coverage for participants with developmental disabilities (such as autism). Under these
circumstances, exhaustion would be futile. To the extent Defendants seek to eliminate potential
class members on exhaustion grounds, the Court would therefore exercise its discretion and
waive exhaustion for D.T. and putative class members.

certification,” the Court would still continue to analyze whether the requirements of Rule 23 have been met. *See Algarin v. Maybelline, LLC*, 300 F.R.D. 444, 457 (S.D.Cal.2014) (citing *Red v. Kraft Foods, Inc.*, No. CV 10–1028–GW(AGRx), 2012 WL 8019257, at *6 (N.D. Cal. Apr.12, 2012)).

b. Future Participants

Defendants next argue that the proposed class should not include those who “will require” NDT therapies because there is “no legal mandate to provide coverage to future participants.” Dkt. # 45 at 6-11. Defendants argue, at length, that there is no federal law that mandates Defendants cover NDT therapies or services for participants with developmental delays. *Id.* at 6-9. Defendants conclude that this lack of a legal mandate to provide coverage affords Defendants the “right at all times to eliminate coverage of various benefits and services for a particular condition in the Plan.” *Id.* at 9-11. Defendants reason that because they cannot be forced to cover specific benefits and can remove them at any time, it would be inappropriate to certify “future” class members based on ERISA claims for benefits that may not exist in future iterations of the Plan. *Id.*

As Plaintiff rightly observes, Defendants’ argument here echoes the arguments set forth in their motion to dismiss. Dkt. # 11; Dkt. # 45 at 6-9; Dkt. # 47 at 5. The Court denied Defendants’ motion then, reasoning that if the Plan covers certain benefits for beneficiaries diagnosed with ASD but refuses to cover ABA therapy, then this may be a violation of the Parity Act. Dkt. # 20 at 4-5. The Court sees little reason to change that ruling at this stage, particularly because a defendant cannot defeat class certification by arguing that it will win on the merits, which is what Defendants seemingly attempt to do here. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465–66 (2013) (“Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.”); *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015).

As for the discretionary nature of the Plan’s coverage applying to future participants, the Court agrees with Plaintiffs that this concern goes to the form of relief,

1 not the question of certification. Dkt. # 47 at 6. The nature of Parity Act allegations
2 ensure that they will be directed at coverage policies that are likely discretionary in the
3 first instance. This is because “[a] permanent exclusion of all benefits for a particular
4 condition or disorder . . . is not a treatment limitation[.]” 29 C.F.R. § 2590.712(a).
5 However, once a group plan decides to provide coverage for mental health benefits, then
6 it may not apply “any financial requirement or treatment limitation to mental health or
7 substance use disorder benefits in any classification that is more restrictive than the
8 predominant financial requirement or treatment limitation of that type applied to
9 substantially all medical/surgical benefits in the same classification.” 29 C.F.R. §
10 2590.712(c)(2)(i). Thus, so long as the Plan provides mental health benefits and the
11 Developmental Delay Exclusion exists (as it does currently), the possibility of a Parity
12 Act violation persists, and the proposed class premised on these violations would remain
13 viable. *See, e.g., A.F. ex rel. Legaard v. Providence Health Plan*, 300 F.R.D. 474, 485
14 (D. Or. 2013) (granting certification despite argument that plan changed policies directed
15 to future claimants because subject practice was still being applied to previous claimants
16 and could continue unless enjoined). Moreover, even if the Court accepts Defendants’
17 arguments at face value, it would be reluctant to deny class certification based solely on
18 the speculation that Defendants may change their Plan language at some unidentified
19 point in the future. The Court will decline to do so here.

20 Having rejected Defendant’s threshold arguments against Plaintiff’s proposed
21 class definition, the Court next turns to whether the proposed class meets the four
22 requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy.

23 1. Numerosity

24 Numerosity is satisfied where joinder would be impracticable. *Smith v. Univ. of*
25 *Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998) (citing *Harris v. Palm*
26 *Spring Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964). There is no set numerical
27 cutoff used to determine whether a class is sufficiently numerous; courts must examine

1 the specific facts of each case to evaluate whether the requirement has been satisfied. *See*
2 *Gen. Tel. Co. of the Nw., Inc. v. Equal Emp't Opportunity Comm'n*, 446 U.S. 318, 329–
3 30 (1980). “As a general rule, [however,] classes of 20 are too small, classes of 20–40
4 may or may not be big enough depending on the circumstances of each case, and classes
5 of 40 or more are numerous enough.” *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D.
6 504, 522 (C.D. Cal. 2012) (quoting *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262
7 (S.D. Cal. 1988)).

8 Plaintiff contends that the proposed class is “at least” 40 individuals, pointing to a
9 discovery response from Defendants that admitted that at least 40 unique individuals have
10 actually submitted claims with a “developmental delay” diagnostic code subject to
11 exclusion under the Plan. Dkt. # 38, Ex. K. Plaintiff also points to a deposition from the
12 Plan’s 30(b)(6) witness, who estimates that that the number of persons with
13 developmental delay conditions enrolled in the Plan who were under age 26 in 2016
14 totaled more than 3,300. *Id.*, Ex. F at 4; Ex. G, at 7:2-9; 103:15-104:19.

15 The Court finds that the evidence put forth by Plaintiffs adequately demonstrates
16 that the proposed class would be at least 40 individuals, and likely more. Defendants
17 claim that this evidence is “over-inclusive” because it may include participants that do
18 not share Plaintiff’s claim. Dkt. # 45 at 12. Defendants also argue that Plaintiff has not
19 shown evidence that other potential class members were denied their claim for benefits,
20 and therefore were not “harmed.” *Id.* The Court does not find these arguments
21 convincing. The first argument appears to be a retread of Defendants’ argument on
22 commonality, which the Court addresses, and rejects, below. Defendants’ second
23 argument appears to be that Plaintiff has failed to demonstrate that all of the proposed
24 class members would have standing. This argument is also somewhat out of place in a
25 numerosity analysis, but is in any case is unavailing, as only D.T., the named Plaintiff,
26 need have standing, which Defendants do not contest. *See, e.g., Jordan v. City of*
27 *Lynnwood*, C17-0309-RAJ, 2018 WL 501572, at *3 (W.D. Wash. Jan. 22, 2018) (“In a

1 class action, standing is satisfied if at least one named plaintiff meets the requirements”)
2 (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 988 (9th Cir. 2007)). Moreover,
3 Defendants fail to dispel the 40 potential class members whose claims with a
4 “developmental delay” diagnostic code were actually submitted. Even if the Court
5 considers just these participants, the Court would find the proposed class sufficiently
6 numerous.

7 Accordingly, the Court finds that the numerosity requirement is met.

8 2. Commonality

9 To meet the commonality requirement, a plaintiff must demonstrate that “there are
10 questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The Supreme
11 Court has explained that this requirement is better understood as an inquiry into the
12 capacity of a class wide proceeding to generate common *answers* apt to drive the
13 resolution of the litigation. *Dukes*, 564 U.S. at 350. Commonality only requires a single
14 significant question of law or fact. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581,
15 589 (9th Cir. 2012).

16 Plaintiff identifies the following, significant common question: Does Defendants’
17 exclusion of NDT and ABA therapies for the treatment of DSM mental health conditions
18 that they consider to be “developmental delays” violate the federal Mental Health Parity
19 Act? Dkt. # 34 at 12. Plaintiff also identifies several other common questions: (1)
20 whether Defendants wrongfully withheld benefits from D.T. and the proposed class; (2)
21 whether Defendants misinformed its participants and beneficiaries about their coverage
22 rights; and (3) if Defendants breached their fiduciary duties to developmentally delayed
23 enrollees. Dkt. # 34 at 13. The Court agrees that resolution of these significant common
24 questions will resolve several issues that are central to the validity of each claim.

25 Defendants argue that resolution of these common questions “will not resolve
26 whether the Plan improperly denied a service for any particular individual member of the
27 proposed class.” Dkt. # 45 at 13. Defendants argue that individual differences in

1 whether participants submitted a claim, were denied, had the medical necessity for the
2 requested treatments, or had different treatment protocols mean that Plaintiff's claims
3 lack commonality. *Id.* at 13-14.

4 The Court disagrees. Defendants' arguments against commonality regarding
5 individualized issues such as the individual "medical necessity" of the treatments would
6 go to preponderance under Rule 23(b)(3), not whether there are common issues under
7 Rule 23(a)(2). *See Mazza*, 666 F.3d at 589 ("Even assuming arguendo that we were to
8 agree with Honda's 'crucial question' contention, the individualized issues raised go to
9 preponderance under Rule 23(b)(3), not to whether there are common issues under Rule
10 23(a)(2)."). Moreover, the proposed class members have in common the issue of whether
11 the Developmental Delay Exclusion violates the Parity Act, regardless of whether a claim
12 was made or whether individual differences in treatment protocols exist. *See A.F. ex rel.*
13 *Legaard v. Providence Health Plan*, 300 F.R.D. 474, 481–82 (D. Or. 2013) (holding that
14 issue of whether plan's "Developmental Disabilities Exclusion violates state or federal
15 law" satisfied commonality); *Z.D. v. Group Health Cooperative*, No. C–11–1119–RSL,
16 2012 WL 5033422, at *4 (W.D. Wash. Oct. 17, 2012) (holding that the issue of whether
17 Defendant's policy of limiting coverage "on the basis of beneficiaries' ages amounted to
18 a breach of their fiduciary duties" was a common issue); *In re Louisiana–Pacific Corp.*,
19 No. Civ. 02–1023–KI, 2003 WL 23537936, at *4 (D. Or. Jan. 24, 2003) (holding that
20 defendant's breach of fiduciary duties under ERISA was a common issue despite other
21 individual distinctions among class members). A singular resolution of this common
22 issue on a class-wide basis will settle this particular question for all putative class
23 members.

24 Finally, the Ninth Circuit does not require that every common question be capable
25 of classwide resolution—rather, so long as a single question exists, this requirement may
26 be satisfied. *See Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir.2013)
27 ("Plaintiffs need not show that every question in the case, or even a preponderance of

1 questions, is capable of classwide resolution. So long as there is ‘even a single common
2 question,’ a would-be class can satisfy the commonality requirement of Rule 23(a)(2).”
3 (quoting *Dukes*, 564 U.S. at 358). Given this relative liberal treatment of commonality,
4 the Court finds that Plaintiff has satisfied the commonality requirement.

5 3. Typicality

6 Under Rule 23(a)(3), the claims or defenses of the class representatives must be
7 typical of the claims or defenses of the class. *See* Fed. R. Civ. P. 23(a)(3). This
8 requirement is generally satisfied so long as the named plaintiffs’ claims are “reasonably
9 coextensive” with those of absent class members. *See Staton v. Boeing Co.*, 327 F.3d
10 938, 957 (9th Cir. 2003). In other words, the question for “typicality is whether other
11 members have the same or similar injury, whether the action is based on conduct which is
12 not unique to the named plaintiffs, and whether other class members have been injured in
13 the same course of conduct.” *See In re Wash. Mut. Mortgage–Backed Secs. Litig.*, 276
14 F.R.D. 658, 665 (W.D. Wash. 2011) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d
15 497, 508 (9th Cir. 1992)).

16 Plaintiff D.T. argues that his claims are typical of those in the proposed class
17 because he (1) like the others, is enrolled in the Plan; (2) is diagnosed with a DSM mental
18 health condition that Defendants subject to the Developmental Delay Exclusion; and (3)
19 has an ongoing need for certain therapies, such as NDT and ABA therapies, to treat his
20 condition. Dkt. # 34 at 14. Defendants argue that D.T.’s claims are not typical because
21 (1) there is an open issue of medical necessity for Plaintiff’s claims; (2) Plaintiff’s
22 treatment protocols have changed over time; and (3) each potential class member would
23 require an individualized inquiry, given the highly idiosyncratic nature of developmental
24 disabilities such as autism. Dkt. # 45 at 14.

25 The Court agrees with Plaintiff. Plaintiff’s claims are typical of the other
26 proposed class member’s claims in that he, like the others, is a Plan participant, requires
27 NDT or ABA therapy to treat a DSM mental health condition, and is subject to the

1 Development Delay Exclusion. *See, e.g., A.D. v. T-Mobile USA, Inc.*, 2:15-CV-00180-
2 RAJ, 2016 WL 3882919, at *2 (W.D. Wash. July 18, 2016) (“Plaintiff’s claims are also
3 typical of class members’ claims where he, like every other class member, allegedly was
4 denied coverage for ABA therapy to treat his ASD”). While typicality “may be
5 destroyed where the representative plaintiff is subject to unique defenses that would not
6 apply to the class as a whole,” the “unique” defense Defendants allege exist here do not
7 rise to this level. *Weidenhamer v. Expedia, Inc.*, C14-1239-RAJ, 2015 WL 7157282, at
8 *10 (W.D. Wash. Nov. 13, 2015). Plaintiff notes that Defendants did not challenge the
9 medical necessity of Plaintiff’s requested treatment during the administrative process,
10 and the Court is reluctant to give much weight to this argument at this point. Dkt. # 46-5
11 at 4. Moreover, Defendants have failed to show how the few idiosyncrasies with D.T.’s
12 treatment, to the extent they exist, are significant enough to mean that Plaintiff’s core
13 claim is not “reasonably coextensive” with those of the other class members. *See Hanlon*
14 *v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (representative’s claims are
15 typical “if they are reasonably coextensive with those of absent class members; they need
16 not be substantially identical.”).

17 Accordingly, the Court finds that typicality is established.

18 4. Adequacy of Representation

19 The adequacy requirement under Rule 23(a) has two components: (1) whether any
20 conflicts of interests exist between plaintiffs and their counsel and other class members,
21 and (2) whether plaintiffs and their counsel will vigorously prosecute the action on behalf
22 of the class members. Fed. R. Civ. P. 23(a)(4); *Hanlon*, 150 F.3d at 1020.

23 Defendants argue that D.T. is not an adequate representative because of various
24 “conflicts” of representation that result from individualized differences among the class,
25 including “individual medical necessity inquiries, standing issues, exhaustion of
26 administrative remedies and the Plan’s legal obligations with respect to parity on past
27 claims and future coverage.” Dkt. # 45 at 16. The Court has already rejected most of

1 these arguments above. Moreover, Defendants fail to point to any actual evidence that
2 conflicts of interest between D.T. and counsel and other class members, and the Court
3 finds none. As Plaintiff notes, the proposed class members, who by definition all have
4 been diagnosed with a qualifying DSM condition, would each have an interest in a
5 determination of whether the Parity Act mandates coverage for NDT and ABA therapy.
6 Dkt. # 34 at 15. As for Plaintiff's counsel, the Court has little difficulty concluding that
7 counsel has provided and will likely continue to provide adequate representation for the
8 proposed class. Dkt. # 34 at 15-16.

9 The Court finds that Plaintiff D.T. is an adequate representative for the class
10 identified above. Accordingly, the adequacy requirement is satisfied.

11 5. Rule 23(b)

12 Having concluded that all the Rule 23(a) factors are present, D.T. must now prove
13 that at least one of the three prongs of Rule 23(b) is satisfied. Fed. R. Civ. P. 23(b).
14 ERISA class actions "are typically certified under Rule 23(b)(1) and/or (b)(2)"
15 *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan & Trust*, No.
16 C09-448-RSM, 268 F.R.D. 670, 677 (W.D. Wash. 2010). Rule 23(b)(1)(A) "focuses on
17 the rights of parties opposing the class," while subpart (B) "focuses on the rights of
18 unnamed class members." *Id.* A class is appropriately certified under Rule 23(b)(1)(A)
19 "where the party is obliged by law to treat the members of the class alike (a utility acting
20 toward customers; a government imposing a tax), or where the party must treat all alike
21 as a matter of practical necessity." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614
22 (1997). A class action is appropriately certified under Rule 23(b)(1)(B) if "separate
23 actions inescapably will alter the substance of rights of others having similar claims."
24 *McCluskey v. Trustees of Red Dot Corp. Employee Stock Ownership Plan & Trust*, 268
25 F.R.D. at 677.

26 Under Rule 23(b)(1), class action is appropriate if prosecuting separate actions by
27 individual class members would create a risk of inconsistent results that would establish

1 incompatible standards of conduct for the party opposing the class, or adjudications with
2 respect to individual class members would be dispositive of, or substantially impair, the
3 interests of the other putative class members not parties to the adjudication. Fed. R. Civ.
4 P. 23(b)(1).

5 Defendants again argue that individualized issues unique to each class member,
6 such as medical necessity, denial, and standing preclude certification under Rule
7 23(b)(1). Dkt. # 45 at 17. The Court again disagrees. “The issue confronting every
8 proposed class member is whether Defendants may deny coverage” for NDT or ABA
9 therapy for qualifying mental health conditions based on the Developmental Delay
10 Exclusion. *K.M. v. Regence Blueshield*, C13-1214-RAJ, 2014 WL 801204, at *15 (W.D.
11 Wash. Feb. 27, 2014) (granting certification under Rule 23(b)(1) for class of plan
12 beneficiaries denied therapies under age exclusion). Instead, the opposite problem exists:
13 variations in how participants or beneficiaries with qualifying conditions obtain coverage
14 for NDT or ABA therapy would risk creating incompatible standards of conduct. As
15 fiduciaries, Defendants are bound to follow the terms of the Plan. *Z.D.*, 2012 WL
16 1977962 at *7. Moreover, “ERISA requires that, ‘where appropriate,’ plan provisions
17 must be ‘applied consistently with respect to similarly situated claimants.’” *Id.* (citing
18 C.F.R. § 2560.503-1(b)(5)). “Thus, were this Court to find that the Plan requires
19 Defendants to act in a certain fashion, ERISA would require [Defendants] to act in a
20 similar fashion toward all beneficiaries—the quintessential (b)(1)(B) scenario.” *Id.* “[I]f
21 another court were to interpret the Plan differently, it would trap Defendants ‘in the
22 inescapable legal quagmire of not being able to comply with one such judgment without
23 violating the terms of another,’” which is what (b)(1)(A) was enacted to remedy. *Id.*; see
24 also *Barnes v. AT & T Pension Benefit Plan-Nonbargained Program*, 270 F.R.D. 488,
25 496 (N.D. Cal. 2010), (“Similarly, with respect to Rule 23(b)(1)(B), the resolution of
26 Barnes' claim would be dispositive of other similarly situated plan participants because
27

1 ERISA requires plan administrators to treat all similarly situated participants in a
2 consistent manner.”) (internal quotations omitted).

3 The Court thus finds that the class is certifiable under Rule 23(b)(1).
4 Alternatively, the Court also finds that the class is certifiable under Rule 23(b)(2) where
5 the Court need only determine the requirements of the Parity Act as applied to the plan as
6 a whole. Rule 23(b)(2) allows certification if the party opposing the class has acted or
7 refused to act on grounds that apply generally to the class so that final injunctive relief or
8 corresponding declaratory relief is appropriate respecting the class as a whole. Here, an
9 injunction will prohibit Defendants’ policy and practice of denying NDT or ABA
10 therapies to treat qualifying mental health conditions based on the Developmental Delay
11 Exclusion. Class certification under 23(b)(2) is therefore also appropriate.²

12 IV. CONCLUSION

13 For the foregoing reasons, the Court **GRANTS** Plaintiff’s Motion for Class
14 Certification. Dkt. # 34.

15
16 DATED this 26th day of March, 2019.

17 
18

19 The Honorable Richard A. Jones
20 United States District Judge
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22
23
24

25
26 ² Because the Court certifies Plaintiff’s proposed class under Rule 23(b)(1) and/or 23(b)(2), it
27 need not and will not address Plaintiff’s alternative arguments for certification under Rule
23(b)(3).